IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 19

UNITED STATES OF AMERICA,

Appellant

v.

MILTON C. JORN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SUPPLEMENTAL MEMORANDUM FOR MILTON C. JORN ON REARGUMENT

This case was argued and submitted to this court during the 1969 term. On April 27, 1970, this Court restored the case to the calendar for reargument. On the merits of the issues raised in the motion to dismiss or affirm, and the brief

filed and argued to the Court last term, defendant continues to rely upon his submission of last term. This supplemental memorandum is submitted on the jurisdictional question in the light of *United States v. Sisson*, ___ U.S. ___, 26 L, Ed. 2d 608 (1970) and in response to the supplemental memorandum filed by the Solicitor General.

Defendant agrees with the statement of facts set forth in the supplemental brief of the government with the exception that it is the position of defendant that the record clearly shows that the dismissal of the jury was by the court on its own motion and not in response to any request of the defense (A. 40-42).

Under the cases as they stand, *Sisson* included, it is clear that defendant's motion in the lower court was a motion in bar. In the light of *Sisson*, the jurisdictional issue presented by this appeal is whether defendant has been "put in jeopardy" within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731. It is defendant's position that this case is controlled by *Sisson* and that no appeal lies because defendant had been placed in jeopardy.

Research reveals no case decided by this Court under the Criminal Appeals Act in which the question of jurisdiction based upon the meaning of "jeopardy" has been raised prior to *Sisson*. The government states that this Court has "entertained government appeals from the dismissal of prosecutions on double jeopardy grounds as a matter of course, *United States v. Tateo*, 377 U.S. 463, 465, and despite jurisdictional challenge, *United States v. Openheimer*, 242 U.S. 85, 86." (Supp. Memo at 2). A reading of these cases shows that the question of jurisdiction is not discussed by this Court in *Tateo*. Apparently this question was not raised. It is true that the question of jurisdiction was discussed in *Openheimer*, but the plea in bar relied upon in that case was a plea of the statute of limitations, made before trial was had. There was no discussion in the case of the question of "jeopardy" within the meaning of the Criminal Appeals Act, 18 U.S.C. 3731.

The Second Circuit, in *United States v. Zisblatt*, 172 F. 2d 743 (2d Cir. 1949) recognized the question now before this Court, but did not decide it. That court had before it a case in which the defendant had been tried to a jury, after the court reserved judgment on motions to dismiss the indictment. After a verdict of conviction by the jury, the court granted the motion to dismiss the indictment.

Judge Hand was faced with the question of whether he should certify the case to the Supreme Court under the Criminal Appeals Act. He pointed out the two possible interpretations of "jeopardy" as used in the Criminal Appeals Act and opined that if the Supreme Court read the term in the Constitutional sense it would have jurisdiction. On that basis the case was certified by Judge Hand, but on motion of the government, the appeal was dismissed, 336 U.S. 934 (1949). The Solicitor General, in his brief in *Sisson*, stated the reason for this dismissal to be that the government was barred by statute from appealing, jeopardy having attached. See *United States v. Sisson, supra*, at 633.

The government attempts to distinguish the instant case from the law set forth in *Sisson*. The Solicitor General, in his Supplemental Memorandum, argues that his admission in *Sisson* is not dispositive of this case.[1] The government contends that this case is distinguishable in that the court and the government in *Sisson* were not addressing themselves to "the situation where one jury had been sworn, then discharged (or its verdict vacated) under circumstances arguably permitting a second trial". (Supp. Memo. at 3). The government's position as set forth in its Suppelemental Memorandum is that:

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[1] In *Sisson* the government admitted that the statutory language "when a defendant has not been put in jeopardy" in the Criminal Appeals Act limits the government's right to appeal under the motion in bar provisions to situations in which the jury has not been sworn. *United States v. Sisson, supra*, at 633.

> In terms of the statutory language . . . the proviso "when the defendant has not been put in jeopardy" refers to "jeopardy" in the second trial whenever the pretrial ruling from which the government seeks to appeal was made in the second trial.

There is certainly nothing in the cases or the legislative history surrounding the Criminal Appeals Act to support such a distinction. In fact, the majority of this Court in *Sisson* held that "jeopardy" within the meaning of 3731 attaches with the empaneling of a jury. The government's argument that "arguably retriable" cases should be distinguished goes against the holding of this Court in that case. In order to determine whether a defendant is "arguably retriable", under that theory, the Court would have to make a Constitutional determination under the Double Jeopardy Clause. The majority of this Court in *Sisson* held that such a determination is not contemplated by the Criminal Appeals Act. *United States v. Sisson, supra*, at 632-33.

The shallow nature of the government's attempt to distinguish is easily manifest. The government argues that an appeal lies in the instant case because defendant's motion was made prior to the empaneling of a second jury. It follows, then, that if defendant had waited to make his motion until after a second jury had been empaneled,[2] there could have been no appeal on the part of the government. The result of the government's argument is that the defendant, in an attempt to promote efficient judicial administration and obviate the necessity of calling a new jury, by the timing of his motion, granted the government a right of appeal it otherwise would not have had. Certainly this was not the intent of Congress in the passage of the Criminal Appeals Act.

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[2] Rule 12(b) of the Federal Rules of Criminal Procedure gives a defendant the option of raising the defense of once in jeopardy either prior to trial or at a later date. *Rollerson v. United States*, 394 U.S. 575 (1969), *reversing*, 405 F.2d 1078 (C.A.D.C. 1968). 18 U.S.C. Rule 12(b)(1) and (2). Notes of Advisory Committee on Rules, See 8 Moores Federal Practice ¶ 12.01[2].

The government's position here is inconsistent with its position in *Zisblatt*. The procedural situation of *Zisblatt* was very similar to the instant case since the motion there was granted after the first jury had been empaneled and before a second jury had been called. The dismissal of that appeal by the government, on grounds that it was barred by statute from appealing, was an admission that "jeopardy" within the meaning of the Criminal Appeals Act attached prior to the swearing of a second jury. Such an interpretation of the "jeopardy" provision of the Criminal Appeals Act is the only logical interpretation.

There was no rule established in *Tateo* and *Openheimer* with respect to the jurisdiction question posed by the "jeopardy" provision of the Criminal Appeals Act. The issue was not raised or met in either of those cases. Therefore, *Sisson* is the first consideration given to that question and the instant case is controlled by the holding of *Sisson* that no appeal will lie by the government after the jury has been empaneled. This court has no jurisdiction to hear the instant appeal and defendant's motion to dismiss the appeal should be granted.

Respectfully submitted,

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Attorney for Appellee